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SUPREME COURT  
STATE OF WASHINGTON

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NO. 82175-5

CLERK THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

VALENTIN SANDOVAL,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRANT COUNTY

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AMICUS CURIAE WASHINGTON DEFENDER ASSOCIATION *ET AL*  
SUPPLEMENTAL BRIEF ADDRESSING *PADILLA V. KENTUCKY*

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TRAVIS STEARNS  
ANN BENSON  
Attorneys for Amicus

WASHINGTON DEFENDER ASSOCIATION  
110 Prefontaine Pl. S., Suite 610  
Seattle, WA 98104  
(206) 623-4321

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A. ARGUMENT

In *Padilla v. Kentucky*, \_\_U.S. \_\_, 130 S.Ct. 1473, 2010 WL 1222274 (Mar. 31, 2010), the Supreme Court held that the Sixth Amendment requires defense attorneys to advise their noncitizen clients of the possible deportation consequences of a plea, emphasizing that the risk of deportation is an “integral part” of the possible penalty for non-citizens. *Id.* at \*5.

Importantly, the court rejected the idea that as a collateral consequence of a conviction deportation fell outside the Sixth Amendment obligation of effective assistance of counsel. The Court noted that it had never adopted the collateral consequences doctrine as a bench mark for ineffective assistance and held that due to the “close connection to the criminal process,” attorneys have an affirmative obligation to advise their clients with respect to the immigration consequences of a plea. *Id.* at \*6.

1. Competent representation requires a defendant to be provided with all available advice about the immigration consequences of a plea.

Like Sandoval, *Padilla* involves the failure to properly advise a noncitizen with respect to the immigration consequences of a guilty plea. In *Padilla*, defense counsel told her client that he “did not have to worry about immigration status since he had been in the country so long”. *Id.* at

\*3. Padilla relied upon his counsel's advice to plead guilty and, like here, his conviction triggered automatic deportation.

The Supreme Court found that, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his deportation. *Id.* Recognizing that the "drastic measure" of deportation is now inevitable for a vast number of noncitizens convicted of crimes, the court found that "the effective assistance of competent counsel" requires affirmative advice about the immigration consequences of a plea. *Id.* at \*7.

This decision rejects the notion that because deportation and removal are merely collateral consequences that an attorney has no affirmative duty to advise a defendant with respect to the immigration consequences of a conviction. *Id.* at \*6. Deportation is closely connected to the criminal process. *Id.* The court held that the "collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation." *Id.*; citing *Strickland v. Washington*, 466 U.S. 668 (1984).

The Court also rejected the idea that an attorney may act within the standards of reasonableness when she merely refrains from providing a client with affirmative misadvice. Finding that "[s]ilence under these circumstances would be fundamentally at odds with the critical obligation

of counsel to advise the client of ‘the advantages and disadvantages of a plea agreement,’” *Padilla* stands for the principal that it is “quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so ‘clearly satisfies the first prong of the *Strickland* analysis.’” *Id.* at \*9 (quoting *Hill v. Lockhart*, 474 U. S. 52, 62 (1985) (White, J., concurring in judgment)).

2. The immigration consequence of a guilty plea is a particularly severe penalty that is intimately tied to the criminal process.

Observing that the “landscape of federal immigration law has changed dramatically over the last ninety years,” the Court reasoned that the “drastic measure of deportation or removal . . . is now virtually inevitable for a vast number of noncitizen convicted of crimes.” *Id.* at \*4. Due to these changes, “accurate legal advice for noncitizens accused of crimes has never been more important” and “deportation is an integral part-indeed, sometimes the most important part-of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Id.* at \*6.

With respect to the distinction drawn by the Kentucky Supreme Court between direct and collateral consequences of a criminal conviction, the Court wrote that it had never applied such a distinction to define the scope of the constitutionally “reasonable professional assistance” required under *Strickland*. *Id.* at \*6. Instead the court relied on the nature of deportation,

which it classified as a “particularly severe penalty” intimately tied to the criminal process. *Id.*

This is clearly the standard that needs to be applied in Washington as well. The Sixth Amendment requires that defense counsel inform noncitizen clients of whether their plea carries the risk of deportation. “Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.” *Id.* at \*11.

3. The professional norm in Washington is to provide advice to non-citizen defendants regarding the immigration consequences of a plea offer.

*Padilla* did not create a new standard for effective assistance for noncitizen defendants, nor did it impose new requirement on defense counsel. The Court analyzed the defense communities own prevailing norms of practice to determine whether the attorney’s representation fell below the “objective standard of reasonableness” required by *Strickland*. Relying upon the standards set out by the ABA and the NLADA, the Supreme Court found that “authorities of every stripe ... universally require defense attorneys to advise as to the risk of deportation consequences for noncitizen clients.” *Id.* at \*7.



Similar standards exist in Washington, including those published by WDA in 2006. The commentary to the WDA Standards for Public Defense Services states that counsel “must be aware of their clients’ immigration status, research the implications of it for their cases, and advise the clients of the consequences of a conviction.” *See* Washington Defender Association Standards for Public Defense Services, Standard 3 commentary at 17 (2007). The ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14.3-2(f) (3<sup>rd</sup> ed. 1999), is consistent with this standard and provides: that “counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.” ABA Standard 14-3.2(f) at 127.<sup>1</sup>

In no other state are the “readily available answers” referenced by the *Padilla* court more available than in Washington. *See Padilla* at \*8. Washington has been a leader in making sure that noncitizens are advised of the immigration consequences of guilty pleas. For more than ten years,

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<sup>1</sup> More information with regard to practice standards is available in the “Defending Immigrants Partnership *Padilla* Practice Advisory,” which can be found at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

the WDAIP has provided immigration advice to attorneys in thousands cases and has provided frequent statewide training.<sup>2</sup>

This means that any attorney, on any criminal matter, may at any time, obtain current information about the immigration consequences of a specific resolution. This has been the standard since WDAIP's inception and sets the standard for what is the professional norm in Washington.

4. Effective representation of counsel requires a criminal defense attorney to give affirmative advice regarding consequences that are "intimately related to the criminal process".

In holding that immigration consequences are not collateral, the *Padilla* Court wrote that it had never sanctioned the direct/collateral distinction as the test for determining what defines the scope of effective assistance of counsel under the Sixth Amendment. *Padilla* at 8. This rationale is clearly grounded in the reality that it is the priorities of the defendant with regard to significant and severe consequences that flow from a conviction that define the Sixth amendment duties and not whether a consequence can be classified as direct or collateral. *Id.*

*Padilla* also makes clear that there is no relevant difference "between an act of commission and an act of omission." *Padilla*, at \*9. *Padilla* reasoned that limiting the Sixth Amendment right to affirmative misadvice

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<sup>2</sup> The original WDA amicus brief provides further information on resources

would invite two absurd consequences: it would permit attorneys to remain silent on important matters, and it would deny even rudimentary deportation advice to an entire class of clients. *Id.*

In fact, amice would ask the court to consider whether the collateral consequence doctrine that it has previously applied is still consistent with *Padilla* and other recent opinions, including *State v. A.N.J.*, 168 Wn.2d 91, 114-15, 225 P.3d 956 (2010). Like *Padilla*, defense counsel in *A.N.J.* failed to properly advise counsel on a “collateral” consequence of the guilty plea. *Id.*, at 115-16. While not the only reason for the reversal, it is apparent from that opinion that this Court is concerned whether a client receives effective assistance when counsel fails to properly advise her client as to consequences that she may deem highly relevant and significant but have been deemed technically “collateral”. *Id.* at 115-17.<sup>3</sup>

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available through WDAIP.

<sup>3</sup>

The collateral consequences doctrine and ineffective assistance claims have separate origins. Recognition of the right to competent representation in the guilty plea context directly “stemmed from the [Sixth Amendment’s] general principle that all ‘defendants facing felony charges are entitled to the effective assistance of competent counsel.’” The collateral consequences doctrine, on the other hand, originated as a policy-based adjunct to the due process requirement that a court ensure the guilty pleas it accepts are voluntarily given. While the right to the assistance of counsel undoubtedly is “included in the conception of due process of law” such that claims grounded wholly or partly in the latter may include reference to the former it does not follow that every jurisprudential limitation on courts’ due process responsibilities applies (or should apply) without alteration to all types of ineffective assistance of counsel claims.

Amice argues that the distinction between direct and collateral consequences can no longer be the sole benchmark to apply in determining adequacy of counsel. *Padilla* makes apparent that this court may not dismiss a claim because it is “merely” a collateral consequence. Instead, we urge the court to adopt the Supreme Court’s test of whether the consequence is “intimately related to the criminal process.” *Id.* at \*7. This standard examines whether the attorney accurately addresses the relevant and material consequences of the plea. Where the attorney’s conduct falls below the “objective standard of reasonableness,” that attorney has acted in contravention of *Strickland* and the issue then becomes one of prejudice.

5. The requirements for effective assistance to noncitizen defendants are clear and readily addressed with the assistance of competent immigration practitioners.
  - a. Effective representation requires understanding how immigration consequences attach to a conviction, as well as an individualized analysis of the factors that determine them.

The representation of a noncitizen defendant envisioned by the *Padilla* Court and established in professional standards depends upon the particular combination of factors in any given case. Determining the immigration consequences of any given charge or plea offer requires

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*In re Resendiz*, 19 P.3d 1171, 1180 (CA 2001) (internal citations omitted, *abrogated by*

conducting a complete analysis, the scope of which is dictated by the realities of how immigration consequences attach to a conviction.

This Court must consider how a conviction causes an individual to suffer adverse immigration consequences when translating *Padilla* into a Washington standard. Competent advice to a client about the immigration consequences of a plea offer requires analysis that does not simply involve characterizing the immigration consequences as clear or unclear. For example, third theft under RCW 9A.56.050 is clearly classified as a crime of moral turpitude (CIMT) under immigration law and can trigger grounds of deportation<sup>4</sup> and inadmissibility.<sup>5</sup> See *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973); *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000); *Garcia-Lopez v. Ashcroft*, 334 F.3d 183 (9<sup>th</sup> Cir. 2003). This characterization alone is insufficient to determine the immigration consequences, such as deportation or ineligibility for discretionary relief, for an individual facing a charge of third degree theft because such a determination depends upon several additional factors, including those below.

➤ **Immigration Status.** A person's immigration status determines which provisions of immigration law are triggered by a given conviction.

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*Padilla*, at \*9).

<sup>4</sup> 8 U.S.C. 1227(a)(2)(A)(i)&(ii).

<sup>5</sup> 8 U.S.C. 1182(a)(2)(A)(i)(I).

For example, a single conviction for a CIMT such as third degree theft will cause a lawful permanent resident (a.k.a. greencard holder) to become deportable if committed within five years of entry.<sup>6</sup> The same conviction will only trigger removal and bar an undocumented person from obtaining lawful status if a sentence of more than six months is imposed.<sup>7</sup>

➤ **Criminal History.** The immigration consequences of a plea vary depending upon the prior criminal record of the individual. For example, if a defendant already has a conviction that renders her deportable, the client's priority and defense counsel's duty may be, as the *Padilla* Court noted, to preserve the client's eligibility for discretionary relief from deportation.<sup>8</sup> Where this is not possible or the client has no available relief, defending the client against immigration consequences are not likely to be a priority.

➤ **Specific Structure of the Criminal Statute.** Many criminal statutes reach some offenses that carry an immigration consequence and others that do not. The immigration consequences of a guilty plea can depend upon whether counsel can negotiate a plea to a portion of the

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<sup>6</sup> 8 U.S.C. 1227(a)(2)(A)(i).

<sup>7</sup> 8 U.S.C. 1182 (a)(2)(A)(i)(I) & (ii)(II).

<sup>8</sup> See e.g., 8 U.S.C. 1229a(1)(A) (permits cancellation of removal for longtime lawful permanent residents who have not been convicted of an offense that is classified as an "aggravated felony" under 8 U.S.C. 1101(a)(43)).

statute that avoids or minimizes immigration consequences. This may require careful crafting of the factual basis in defendant's plea statement. For example, assault in the fourth degree under RCW 9A.36.041 can be committed numerous ways, some of which involve the use of force and others which do not. *State v. Davis*, 60 Wn.App. 813, 808 P.2d 167 (1991); *Suazo-Perez v. Mukasey*, 512 F.3d 1222 (9<sup>th</sup> Cir. 2008). A defendant whose fourth degree assault plea statement indicates elements involving the use of force will have a conviction that will be classified as a "crime of violence" under immigration law and, as such, can trigger severe immigration consequences.<sup>9</sup>

➤ These are not "unclear" situations. They are the normal issues that are present in the great majority of cases involving noncitizen defendants. It is not possible to determine the immigration consequences of a given charge or plea without considering the client's specific immigration status and the nature of the charges.

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<sup>9</sup> Classification of a conviction, even a misdemeanor assault, as a "crime of violence" can trigger deportation as an aggravated felony under 8 U.S.C. 1101(a)(43)(F) or as a crime of domestic violence under 8 U.S.C. 1227(a)(2)(E)(i). *See also Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9<sup>th</sup> Cir. 2006); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). It can also trigger substantial sentence enhancement penalties if convicted of illegal reentry under 8 U.S.C. 1326. *See* United States Sentencing Guidelines §2L1.2.

- b. The scope and standard for effective representation of noncitizen defendants includes four necessary steps.

Under the mandates outlined by *Padilla* as well as national and state professional standards, effective representation of noncitizen defendants regarding immigration consequences requires four essential steps.

➤ **Step One: Investigate the Facts.** Individual facts such as immigration status and criminal history are essential to accurately determining immigration consequences.

➤ **Step Two: Ascertain the Defendant's Priorities.** Not all noncitizen defendants will have the same priorities with regard to possible immigration consequences. A longtime lawful permanent resident with family and communities ties, such as Mr. Sandoval, reasonably gives the highest priority to resolving the criminal charges in a way that preserves his lawful immigration status, even if it means pleading guilty to a more serious offense, agreeing to more jail time, or going to trial and risking a significantly higher sentence. However, an undocumented defendant with few family and community ties to the U.S. may be more concerned with getting the shortest period of incarceration.

As the Court recognized in *Padilla* and *INS v. St. Cyr*, 533 U.S. 289 (2001), a primary consideration for a noncitizen client may be to preserve



eligibility to request discretionary relief from deportation so he could obtain or keep lawful immigration status and remain lawfully in the U.S.:

We too have previously recognized that “[p]reserving the client’s right to remain in the United State may be more important to the client than any potential jail sentence...Likewise, we have recognized that ‘preserving the possibility of discretionary relief from deportation...would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead proceed to trial.’”

*Id.*, (quoting *St. Cyr*, 553 U.S., at 323).

➤ **Step Three: Analyze And Advise The Defendant Regarding**

**The Immigration Consequences of the Charged Offense(s) and Any**

**Plea Alternatives.** A noncitizen defendant can only make crucial

decisions regarding the potential criminal and immigration penalties if she has accurate information about those penalties. Washington attorneys have easy access to the resources necessary to get the accurate, detailed immigration analysis quickly.

With proper analysis, counsel can advise a client that a conviction for any given offense (either at trial or by plea) is nearly certain to carry a specific immigration consequence. Armed with informed advice about the a risk that a plea will have specific immigration consequences, counsel and her client can determine the options and strategies available for resolving the case in light of client’s priorities.

➤ **Step Four: Defend The Case Accordingly.** The circumstances of the case, client's priorities and immigration law together will determine defense counsel's strategy for effectively representing her noncitizen client. *Padilla* holds that where avoiding or mitigating immigration consequences are a priority to the defendant, counsel is required to actively and competently engage in defending against them.

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.

*Id.* at 16.

Available options for effectively defending against immigration consequences will vary depending upon the defendant's circumstances. Mr. Sandoval's case is the perfect illustration for counsel's duty. As a longtime lawful resident with no significant criminal history, he made clear to his attorney that avoiding deportation was his utmost priority. Negotiating a plea resolution that did not trigger deportation, or at least preserved his eligibility to request discretionary relief, should have been defense counsel's primary goal. Had counsel followed the steps outlined herein it is highly likely that the outcome of this case would have been different.

B. CONCLUSION

*Padilla* makes clear that defense counsel's advocacy can be, and often is, the determining factor in negotiating a resolution that avoids the "severe penalty" of deportation and permanent banishment. In giving effect to *Padilla's* mandate under Washington law, this Court should adopt a standard that acknowledges the significance of what is at stake for noncitizen defendants, the reality of what is required to actually provide effective assistance, as well as the resources that the legislature has made readily available to accomplish these tasks. As such, we ask this Court to find that the standard for competent representation of a non-citizen client in Washington requires counsel to investigate facts, ascertain priorities, analyze immigration consequences and defend the case accordingly.

DATED this 3<sup>rd</sup> day of May, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

Travis Stearns (WSBA 29935)  
Ann Benson (Alaska Bar No. 9206013)  
Attorneys for Amicus

Washington Defender Association  
110 Prefontaine Pl., S., Suite 610  
Seattle, WA 98104  
(206) 587-2711